JUN 15 1954
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 83

THE HOUSING AUTHORITY OF THE CITY OF DALLAS, TEXAS,
Petitioner,

v.

EDDIE THOMAS, ET UX,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

MIKE MCKOOL AND BERT BADER,
Counsel for Eddie Thomas, et ux, Respondents.

MCKOOL & BADER,
Of Counsel for Respondents.

WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

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OCTOBER TERM, 1953

No. 774

THE HOUSING AUTHORITY OF THE CITY OF DALLAS, TEXAS,
Petitioner,

v.

EDDIE THOMAS, ET UX,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION OF WRIT OF CERTIORARI

May It Please the Court:

Respondents respectfully submit that the petition for Writ of Certiorari in this case should be denied because:

A. This case involves only a question of local law, i. e., the construction and application of a Texas Statute which provides a method whereby the condemnor, if it so desires, can take possession of the landowner's property before the condemnation is completed.

B. There is no denial of due process nor denial of equal protection of the laws in violation of the 14th Amendment of the United States Constitution in the construction of this Texas Statute where the Statute merely provides a method whereby the condemnor can take possession of the landowner's property after the rendering of the commissioners' award and prior to final judgment.

The Supreme Court of Texas has construed Article 3268 of the Revised Civil Statutes of Texas. The Judgment of the Texas Supreme Court is conclusive as to the construction and application of the State Statute and State Constitution. *Senn v. Tile Layers Protective Union, Local No. 5, 57 Supreme Court, 857, 301 U. S. 468, 81 Law Edition 1229; Aero Mayflower Transit Co. v. Board of Railroad Commissioners of the State of Montana, 68 Supreme Court, 167, 332 U. S. 495, 92 Law Edition 99.* Therefore, the only contention that could be made by the petitioner that would present a federal question would be that the statute under which they proceeded to condemn the landowner's property is unconstitutional. That is, the only right which the petitioner has to condemn the landowner's property is given to them by the very statute which they are seeking to hold unconstitutional. If the statute were unconstitutional, then the petitioners are in the position of being mere trespassers on the property of the landowner because they would have no right or authority to condemn under the very statute which they contend is unconstitutional. We must keep in mind the construction of the statute by the Supreme Court of Texas which is as follows (R. 26):

> "First, we should keep in mind that there is no requirement in the law that the landowner be dispossessed and his property delivered to the condemnor during the pendency of the litigation. Neither is it required that the condemnor make a deposit unless he desires possession of the landowner's property during the pendency of litigation."

Needless to say, it cannot be contended that a statute is unconstitutional because it deprives the condemnor of due process of law and equal protection of the laws, where the condemnor has a choice of whether he desires to go into possession of the landowner's property pending a final hearing of the case. It must be remembered that the condemnor does not have to go into possession pending a hearing before the County Court but can wait until the hearing before the County Court, when the rights of the parties are fixed and the value of the landowner's property is determined. However, if the condemnor desires to go into possession of the property before a final hearing in the County Court, then the condemnor must deposit the amount of the Commissioners' award, which the landowner can withdraw. In other words, the choice is that of the condemnor. If the condemnor chooses to deprive the landowner of the possession of his property pending a final hearing of the case, then the landowner is entitled to the deposit, which takes the place of his property. If the condemnor has any fears that the final judgment of the County Court will be less than that awarded by the Commissioners, then the condemnor need not take possession of the property pending a final hearing of the case. The choice is wholly that of the condemnor. Surely it cannot be contended that a statute deprives a con-

demnor the protection of the laws and due process of law where the choice is wholly that of the condemnor. The statute is not one that requires a condemnor to take possession but merely provides a means whereby the condemnor can take possession prior to final disposition of the case, if the condemnor so desires. However, if the condemnor deprives the landowner of his property prior to final disposition of the case, then the condemnor must make available to the landowner the amount of the Commissioners' award which takes the place of the landowner's property. The procedure is not unconstitutional, but is in accordance with Article 1, Section 17 of the Constitution of the State of Texas and the 14th Amendment of the United States Constitution.

In Lewis on Eminent Domain, 3d Edition, Vol. 2, Sec. 843, page 1471, it states:

> "Where the damages have been deposited and received by the owner, and, on appeal, a less sum is awarded, it has been held proper to enter judgment against the owner for the amount he is liable to refund."

The condemnor has not been deprived of any constitutional rights in this case and in fact, the holding of the Supreme Court of Texas is in accord with the Constitutional provision that the landowner should not be deprived of his property without adequate compensation being paid.

C. The construction of the Texas Statute by the Texas Supreme Court is in accord with Rule 71-A (j) of the Federal Rules of Civil Procedure.

Rule 71-A (j) of the Federal Rules of Civil Procedure, Title 28, of the U. S. C. A. is in accord with the construction by the Texas Supreme Court of Article 3268. The Federal Rule is as follows:

> "The plaintiff shall deposit with the Court any money required by law as a condition to the exercise of the power of eminent domain; and, although not so required, may make a deposit when permitted by statute. In such cases the Court and attorneys shall expedite the proceedings for the distribution of the money so deposited and for the ascertainment and payment of just compensation. If the compensation finally awarded to any defendant exceeds the amount which has been paid to him on distribution of deposit, the Court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to him, the Court shall enter judgment against him and in favor of the plaintiff for the overpayment."

In the case of *Dohany v. Rogers, 281 U. S. 362, 74 Law Edition 904, 50 Supreme Court, 299*, this Honorable Court construes the statute that was in effect prior to passage of Rule 71-A of the Rules of Civil Procedure on August 1, 1951.

> "When the declaration is filed, the amount of estimated compensation is to be deposited with the Court to be paid as the Court may order, 'for or on account' of the just compensation to be awarded the owners. Thus the acquisition by the government of title and immediate right to possession, and the deposit of the estimated compensation occurs as steps in the main proceeding. The purpose of the Statute is two-fold. First, to give the government immediate possession of

> the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the government's estimate of the value of the property."

D. Petitioner cites no authority in support of its Petition for Writ of Certiorari to show the procedure violates the 14th Amendment of the United States Constitution.

The petitioner cites no authority in support of their application for Writ of Certiorari showing that the construction of this Texas Statute is unconstitutional. Condemnation is not a new proceeding in the law and there have been condemnation proceedings throughout the United States since our country was first founded. There have been numerous cases decided and numerous textbooks written on the law of condemnation and petitioner has not cited one case to this Honorable Court showing that the payment to the landowner at the time the condemnor takes possession is unconstitutional. The presumption must therefore be that there is no authority for the position taken by petitioner except its assertion that it is so. Petitioner's brief in support of the Writ in this case spends a great deal of time talking about stare decisis and re-enactments of Article 3268 by the Texas Legislature. Respondents would show the Court that this was the first time that the Supreme Court of Texas has ever been called upon to decide and construe this particular statute. The Supreme Court, in their opinion, frankly admit that there were decisions by the inter-

mediate Courts of Texas which support both views of the question (R. 26). Respondents would show the Court that the Texas Supreme Court has construed this statute which is a question of local law, and that construction is binding upon this Honorable Court.

Respondents pray that the Writ of Certiorari be denied.

Respectfully submitted,

MIKE MCKOOL AND BERT BADER,
Counsel for Eddie Thomas, et ux, Respondents.

MCKOOL & BADER,
Of Counsel for Respondents.